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No. 98-149

In The

Supreme Court of the United States

October Term, 1998

COLLEGE SAVINGS BANK,

Petitioner,

v.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does a State deprive a person of property without due process of law if it allegedly engages in false advertising in violation of section 43(a) of the Lanham Act, such that Congress, acting pursuant to section 5 of the Fourteenth Amendment, may abrogate Eleventh Amendment immunity and make the States subject to suit in federal court for Lanham Act violations?

2. Does *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), which held that Congress may employ its authority under the Commerce Clause to compel States to "waive" their Eleventh Amendment immunity if they participate in commerce regulated by Congress, survive this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and apply to claims against a state agency arising out of the State's administration and promotion of a college tuition-funding program?

PARTIES TO THE PROCEEDING

The parties are stated correctly in the "Parties to the Proceeding" on page ii of the Brief for Petitioner.

The Florida legislature has changed Respondent's name from Florida Prepaid Postsecondary Education Expense Board to the Florida Prepaid College Board. This Brief will refer to Respondent as "Florida Prepaid," for the sake of clarity and convenience. Respondent is a body corporate of the State of Florida and does not have any parent or subsidiary corporations. *See* Fla. Stat. § 240.551, J.A. 45.

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COUNTERSTATEMENT OF THE CASE

Respondent Florida Prepaid is an agency of the State of Florida that was created to administer a prepaid college tuition and dormitory-expense program. *See* Fla. Stat. § 240.551, J.A. 45. The principal purpose of the Florida Prepaid program is to enable and encourage the people of Florida to obtain the benefits of higher education at Florida institutions by providing a reliable mechanism for paying college expenses. Participants pay a contract price today that entitles program beneficiaries to college credit hours or dormitory services at a future date. The contract is for guaranteed college services; it is not an investment contract and the beneficiaries do not receive funds. Participation is generally open to Florida residents or the children of Florida residents. *See* Fla. Stat. § 240.551(2)(e)(1)-(3), J.A. 46. The program is a top Florida priority:

> The State considers this an essential governmental operation to assist its citizens to access higher education. All legal and beneficial interests in the assets held by the trust fund are vested in the State for its exclusive benefit and the exclusive benefit of the colleges and universities; therefore, payments are guaranteed to be made on the beneficiary's behalf to the State college or university. Exercise of full benefits under the contract guarantees the beneficiary receipt of services and the beneficiary will not receive any funds.

Florida Prepaid Master Covenant, § 5.08 (Exhibit A to Florida Prepaid Answer to Complaint; *see* J.A. 29, ¶ 16).

The District Court found that Florida Prepaid is an "arm of the State" of Florida and thereby entitled to assert Florida's Eleventh Amendment immunity as a bar to jurisdiction in federal court. *College Savings Bank v. Florida Prepaid Postsecondary*

Education Expense Board, 948 F. Supp. 400 (D.N.J. 1996); *see* Pet. App. at 46a-58a. Neither College Savings Bank nor the United States sought review of that finding before the Court of Appeals.

Petitioner College Savings Bank ("CSB" or "Petitioner") is a commercial financial institution that markets a certificate of deposit product designed to assist customers with investing to cover the costs of a college education. CSB owns a United States patent relating to a calculation methodology used with its certificate of deposit product. In 1994, CSB sued Florida Prepaid for patent infringement in the United States District Court for the District of New Jersey. In 1995, CSB brought a second action against Florida Prepaid in the same court, this time alleging violations of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). The Lanham Act claims relate exclusively to alleged false advertising by Florida Prepaid in its descriptions of its own tuition funding program. There are no allegations of false statements regarding CSB's certificate of deposit product, nor any claims for trademark infringement, trade dress infringement, or other matters covered by the Lanham Act.

After this Court announced its decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), Florida Prepaid moved to dismiss both the Lanham Act action and the patent infringement action as barred by the Eleventh Amendment. The United States intervened to defend the constitutionality of the Trademark Remedy Clarification Act of 1992, Pub. L. No. 102-542, 106 Stat. 3567 (1992) ("the TRCA"), which made the States amenable to suit in federal court for violations of the Lanham Act, and the Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992), which made the States amenable to suit in federal court for patent infringement. With respect to the TRCA, the United States argued only that Florida Prepaid had lost its Eleventh Amendment immunity to Lanham Act suits via the "constructive

waiver" doctrine of *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964). CSB argued both that the *Parden* doctrine applied and that the TRCA was constitutional because Congress possessed authority under section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity and permit Lanham Act false advertising suits against the States in federal court.

In a single decision, the District Court granted the motion to dismiss the Lanham Act case but denied the motion to dismiss the patent infringement action. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 948 F. Supp. 400 (D.N.J. 1996), Pet. App. B. In the instant case, both CSB and the United States appealed the dismissal of the Lanham Act suit to the Third Circuit, which affirmed. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 131 F.3d 353 (3d Cir. 1997), *cert. granted*, 67 U.S.L.W. 3433 (1999), Pet. App. A. In the patent infringement case, Florida Prepaid appealed the decision to the United States Court of Appeals for the Federal Circuit, which affirmed. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 148 F.3d 1355 (Fed. Cir. 1998), *cert. granted*, 67 U.S.L.W. 3433 (1999), Pet. App. D.

SUMMARY OF ARGUMENT

This Court's decision in *Seminole Tribe of Florida v. Florida* established that Congress has no power under Article I of the Constitution to abrogate the States' Eleventh Amendment immunity. That holding means that Congress cannot, when legislating pursuant to the Commerce Clause, make the States amenable to suit in federal court for alleged violations of federal law. Because the Lanham Act, as amended by the TRCA, is unquestionably an exercise of congressional authority under the Commerce Clause, the Court of Appeals properly affirmed the

District Court's dismissal of CSB's Lanham Act-based false advertising claim against Florida Prepaid.

Although Congress does have power under section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity in appropriate cases, not every legislative act under Article I can be justified as an exercise of Fourteenth Amendment enforcement authority. As this Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), abrogation pursuant to the Fourteenth Amendment must be restricted to legitimate congressional efforts to enforce the substantive guarantees of that amendment — there must be a constitutional wrong Congress seeks to remedy or prevent. In particular, the concept of "property" under the Fourteenth Amendment cannot be made so elastic that it becomes the proxy for every statutory right or interest created by Congress under the Commerce Clause, such as a false advertising claim brought under the Lanham Act. Finding Fourteenth Amendment abrogation authority to be coextensive with congressional power under Article I, as CSB demands, would nullify *Seminole Tribe*, defy *City of Boerne*, and virtually eliminate the Eleventh Amendment.

This Court has never suggested that a business's statutory right under the Lanham Act to be free of a competitor's false advertising about the competitor's own product constitutes "property" for purposes of the Fourteenth Amendment. Recognizing such a statutory interest as a constitutionally protected property right would essentially federalize much of the common law of tort and contract, and would subject States to litigation in federal court every time a governmental action is alleged to affect a privately owned business. Florida Prepaid agrees with the United States that the concept of property embodied in the Fourteenth Amendment simply does not extend to attenuated interests of the type asserted by CSB.

Even assuming that the interest in being free of false advertising could constitute a legitimate property right for purposes of the Fourteenth Amendment, CSB has failed to demonstrate that the State of Florida has deprived it of such property without due process of law. The denial of due process, not the mere deprivation of property, is necessary to justify a remedial scheme that includes the abrogation of Eleventh Amendment immunity. States already provide common law remedies for unfair competition, and state courts also have concurrent jurisdiction to adjudicate claims arising under the Lanham Act. Florida, like many States, permits "takings" claims to be brought against the State in state court, and also has enacted a limited statutory waiver of its sovereign immunity for tort claims brought against the State in its own courts. Thus, Florida provides adequate legal process to redress any deprivation of property that may have occurred in CSB's case or in similar unfair competition cases. The TRCA is therefore unconstitutional under the rule of *City of Boerne*, because the TRCA purports to provide a remedy — suits against the States in federal court — for a nonexistent constitutional harm — the supposed denial of due process by States that allegedly have deprived persons of property through false advertising.

Accordingly, congressional abrogation of Florida Prepaid's Eleventh Amendment immunity cannot be justified as an exercise of Fourteenth Amendment enforcement power.

Nor may jurisdiction over Florida Prepaid be maintained through application of the constructive waiver doctrine of *Parden v. Terminal Railway of Alabama Docks Department*, which provided that Congress could require a State to "waive" Eleventh Amendment immunity as the price of engaging in commercial activity subject to federal legislative control. The *Parden* doctrine cannot be applied here because *Parden* itself directly conflicts with *Seminole Tribe*, and therefore should be formally overruled. Congress should not be permitted to do indirectly, by means of

a compulsory waiver doctrine, what it no longer can do directly after *Seminole Tribe*. *Parden* was squarely based on congressional abrogation authority assumed to exist under the Commerce Clause. Now that the *Seminole Tribe* has made clear that congressional authority under Article I does not include the power to curtail Eleventh Amendment immunity, *Parden* is bereft of support, and cannot justify CSB's suit against Florida Prepaid.

Even if *Parden* somehow remains good law, it does not apply to the activities of Florida Prepaid here. As the Court of Appeals correctly found, Florida Prepaid engages in the core governmental function of furthering the education of its citizens by providing a service that enables state residents to attend college or university. Mischaracterizing this activity as a money-making or commercial endeavor turns a blind eye to the realities of this non-profit education program as well as to the increasingly creative strategies that state governments must employ in order to discharge their primary responsibility of securing the well-being of their citizens. Florida Prepaid's education-financing activities are essentially governmental, not commercial, and therefore *Parden* is inapplicable.

Finally, resort to *Parden* also fails because the TRCA does not regulate prepaid tuition programs and is therefore incapable of triggering a *Parden* waiver of immunity. The Lanham Act, as amended by the TRCA, regulates *all* interstate commerce, and therefore does not alert States to the loss of their Eleventh Amendment immunity as a consequence of operating prepaid tuition programs. The TRCA notifies States only that they have no immunity if they are alleged to have violated the Lanham Act — a warning that is far too broad and vague to satisfy *Parden*.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED *SEMINOLE TRIBE v. FLORIDA* AND *CITY OF BOERNE v. FLORES* IN HOLDING THAT CONGRESSIONAL AUTHORIZATION OF SUITS AGAINST THE STATES IN FEDERAL COURT ON FALSE ADVERTISING CLAIMS CANNOT BE JUSTIFIED AS AN EXERCISE OF FOURTEENTH AMENDMENT ENFORCEMENT POWER.

The decision of the Court of Appeals is manifestly correct. The tightly confined holding is consistent with this Court's precedents regarding the Eleventh and Fourteenth Amendments. In contrast, CSB asks this Court to adopt a sweeping theory of property rights and Fourteenth Amendment enforcement power that the Court of Appeals properly rejected, and that even the United States, which intervened in this litigation in order to defend the TRCA, has declared unfounded.

A. The Statutory Right To Be Free Of A Competitor's False Advertising Is Not "Property" That Congress May Protect Under Section 5 Of The Fourteenth Amendment.

(1) In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court held that Congress has no power under the Indian Commerce Clause or the Interstate Commerce Clause to abrogate the Eleventh Amendment immunity enjoyed by the States. As the Court of Appeals recognized, the holding of *Seminole Tribe* is squarely applicable here. The Lanham Act represents an exercise of congressional power under the Interstate Commerce Clause. *See, e.g., Trade-Mark Cases*, 100 U.S. 82, 94-96 (1879) (stating that congressional power to provide trademark protection can arise only from the power to regulate interstate commerce). Thus, claims brought under the Lanham Act against a State or state agency in federal court pursuant to the TRCA must be dismissed as barred by the Eleventh Amendment.

To overcome this limitation on congressional power and rescue the TRCA from unconstitutionality, CSB argues that the TRCA can be treated as an exercise of Congress's enforcement power under section 5 of the Fourteenth Amendment. This argument requires that a person's interest in being free from the type of false advertising alleged here be deemed a "property" right, so that section 5 of the Fourteenth Amendment may be triggered. Indeed, according to CSB, because a "business" is a form of property, any state action that affects that business in any way is a potential impingement upon property that Congress may remedy or deter under section 5. *See* Brief for Petitioner at 19-20. The Eleventh Amendment, it would appear, simply has no force where a "business" is concerned.

After *Seminole Tribe*, however, close scrutiny must be applied to any contention that a particular congressional attempt to abrogate Eleventh Amendment immunity legitimately exercises Fourteenth Amendment power. *Seminole Tribe* makes it perfectly plain that Congress enjoys no power to abrogate Eleventh Amendment immunity under *any* provision of Article I of the Constitution. Congressional enforcement power under section 5 of the Fourteenth Amendment, which applies only to the substantive provisions of that Amendment, should not be improperly converted into a replacement for the entirety of Article I. Congress is not free to transform exercises of Article I power into applications of Fourteenth Amendment enforcement authority simply because the Fourteenth Amendment is Congress's only remaining source of power to abrogate the Eleventh Amendment. Judicial recognition of such pretextual invocations of Fourteenth Amendment power would flout the rule of *Seminole Tribe* and would eviscerate the Eleventh Amendment. "The need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 278 (1997) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 105 (1984)).

A notable law review commentary has explained the jeopardy to the Eleventh Amendment created by unjustified congressional reliance on Fourteenth Amendment authority to protect congressionally created rights:

> In *Seminole Tribe*, the Court held that Congress has the power to abrogate Eleventh Amendment immunity pursuant to its power to enforce the Fourteenth Amendment, but not under its Article I legislative power. The Fourteenth Amendment, however, includes a clause prohibiting states from depriving persons of property without due process of law. Can Congress pass a statute giving individuals a property right vis-a-vis the states and then, to "enforce" the Due Process Clause, abrogate the states' Eleventh Amendment immunity with respect to suits to enforce that right? An affirmative answer to this question threatens to reduce *Seminole Tribe*'s abrogation holding to nothing. . . . If this reasoning were to hold, then Congress's power to abrogate Eleventh Amendment immunity would appear to be coextensive with its power to legislate under Article I, and, if so, *Seminole Tribe*'s holding that Congress lacks the power to abrogate Eleventh Amendment immunity under Article I would be eviscerated.

Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1744-46 (1997); *see also* Henry Paul Monaghan, *Comment: The Sovereign Immunity "Exception,"* 110 Harv. L. Rev. 102, 126 n.162 (1996) ("Whether the *Seminole Tribe* majority would permit so transparent an evisceration of its holdings is unclear."). Here, the Court of Appeals properly declined CSB's invitation to "eviscerate" the Eleventh Amendment. In so doing, the Third Circuit followed the teachings of this Court on both Eleventh Amendment and Fourteenth Amendment issues.

There is no historical tradition linking the Lanham Act and the Fourteenth Amendment. The Lanham Act always has been regarded as an exercise of the power to regulate commerce.[1] The legislative history of the TRCA, which amended the Lanham Act to permit suits against the States in federal court, contains only a passing reference to the Fourteenth Amendment as a source of authority for congressional abrogation of immunity for trademark infringement suits, *see* S. Rep. No. 102-280 (May 12, 1992), at 7-8, and is completely silent with respect to the *false advertising* prong of the Lanham Act, which is all that is involved here. Thus, there is no direct support for the view that Congress intended to use its Fourteenth Amendment power to permit suits against the States in federal courts on federal unfair competition claims.

Of course, Congress's declarations of the sources of its authority do not by themselves render legislation constitutional. *See, e.g., Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Accordingly, the brief mention of the Fourteenth Amendment in the legislative history does not convert the TRCA into an *appropriate* exercise of Fourteenth Amendment enforcement authority with respect to claims under the Lanham Act. *See Oregon v. Mitchell*, 400 U.S. 112, 129 (1970); *Ex Parte*

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1. The legislative history of the Lanham Act states:

> Marks used in interstate commerce are properly the subject of Federal regulation. It would seem as if national legislation along national lines securing to the owners of trade-marks in interstate commerce definite rights should be enacted and should be enacted now. There can be no doubt under the recent decisions of the Supreme Court of the constitutionality of a national act giving substantive as distinguished from merely procedural rights in trade-marks in commerce over which Congress has plenary power.

S. Rep. No. 1333 (May 14, 1946), at 1277.

Virginia, 100 U.S. 339, 345-46 (1879). This Court retains the ultimate responsibility for determining whether a given enactment is a legitimate exercise of Fourteenth Amendment power. *See generally City of Boerne v. Flores*, 521 U.S. 507 (1997).

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), where this Court first announced the doctrine that Congress may abrogate Eleventh Amendment immunity pursuant to the Fourteenth Amendment, did not directly answer the question of how to identify appropriate Fourteenth Amendment enforcement action. There was no need to do so in that case, because the issue was not in dispute in *Fitzpatrick*, a Title VII case that clearly implicated core Fourteenth Amendment concerns. *See* 427 U.S. at 453 n.9. The *Fitzpatrick* Court nevertheless emphasized that the purpose of section 5 is to enforce the guarantees of the Fourteenth Amendment. *See id.* at 453-56. If, as here, the protections of the Fourteenth Amendment are completely inapposite to the legislation in question, the statute cannot be considered an appropriate exercise of Fourteenth Amendment authority.

This Court recently confirmed that Congress's power under section 5 of the Fourteenth Amendment is remedial, not substantive, in *City of Boerne v. Flores*. "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." 521 U.S. at 527. Congress may enforce the guarantees of the Fourteenth Amendment as they have been interpreted by the courts, but Congress may not extend or reinterpret those protections:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means."

> . . . Under this approach, it is difficult to conceive of a principle that would limit congressional power.

Id. at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). When Congress acts under section 5,

> there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

521 U.S. at 520.

(2) Notwithstanding *City of Boerne*, CSB argues that the TRCA does rest on the enforcement authority of the Fourteenth Amendment because the Act was intended to protect "property." As applied to the Lanham Act claims asserted here, however, CSB's argument fails because this case does not directly involve any kind of property. The Lanham Act claims brought against Florida Prepaid are complaints about alleged false advertising. An interest in being free of false advertising simply does not qualify as a property right for purposes of the due process clause of the Fourteenth Amendment. "A false advertising claim implicates the Lanham Act's purpose of preventing unfair competition," *Stanfield v. Osborne Industries*, 52 F.3d 867, 873 (10th Cir.), *cert. denied*, 516 U.S. 920 (1995), but does not implicate the substantive guarantees of the Fourteenth Amendment, and therefore cannot be the basis for the abrogation of Eleventh Amendment immunity.

CSB refers the Court to cases discussing the Lanham Act's general protection of "property rights." *See* Brief for Petitioner at 15-17. None of these cases, however, holds that a *false advertising claim* constitutes a property right, let alone a right

that may be enforced via the Fourteenth Amendment. Florida Prepaid is accused of nothing more than making misrepresentations about *its own* tuition payment program. CSB's interest in opposing such statements may create a right of action under the Lanham Act, but does not create a property right in such opposition.[2] *See Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that some intangible rights, such as a person's reputation, do not qualify as property protected by the Fourteenth Amendment.).

According to CSB, the tort of unfair competition, "by definition," protects property interests. Brief for Petitioner at 15. Virtually every conceivable tort, however, relates in some fashion to either property interests or personal interests. If these interests, merely because they are "protected" by tort law, are deemed to constitute property or liberty rights subject to Fourteenth Amendment guarantees, then under CSB's analysis Congress would have the authority to make the States amenable to suit in federal court on any common law tort, as long as it had been "federalized" through legislation. *See* Brief for Petitioner at 16 ("[T]he Fourteenth Amendment, by affording protection to 'property,' by its terms extends to the tort of unfair

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2. The Court of Appeals properly rejected CSB's reliance on *International News Service v. Associated Press*, 248 U.S. 215 (1918). *See* Pet. App. at 15a n.4. *International News* was not a constitutional case and did not involve any attempt to determine the parameters of the Fourteenth Amendment. The Court simply noted,

> In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right. . . .

248 U.S. at 236 (citations omitted). Clearly, the Fourteenth Amendment does not embrace such an expansive definition of property.

competition."). This would make federal courts the forum of choice for business torts alleged against States. The Court of Appeals understood the implications of CSB's extreme position, and rightly rejected CSB's argument. *See Paul v. Davis*, 424 U.S. at 699 (criticizing premise "that the Due Process Clause and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims").

CSB relies heavily on the notion that a "business" is a property right. That is not in dispute. Florida Prepaid agrees that a business constitutes property, but that is not the question before the Court. The real question is whether every state action that affects a business negatively can be considered a potential deprivation of property without due process of law within the meaning of the Constitution. The answer to this question must be "No." This Court has never held that the Due Process Clause of the Fourteenth Amendment protects the right to be free in one's business from a competitor's false advertising if the alleged false advertising comes from a state actor. The connection between such conduct and a genuine, protected property right is simply too tenuous. Thus, even an unequivocal congressional attempt to constitutionalize causes of action for false advertising would fail to pass muster under the rule of *City of Boerne*. Congress lacks the authority to craft its own applications of the Due Process Clause, particularly where the resulting remedial scheme imposes "a heavy litigation burden on the States" and "contradicts vital principles necessary to maintain separation of powers and the federal balance." *City of Boerne*, 521 U.S. at 534, 536.

In *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 170 (1934), the Court observed that "[t]he Fourteenth Amendment does not protect a business against the hazards of competition." The Court of Appeals correctly relied on this decision in rejecting CSB's arguments. *See* Pet. App. at 16a. Petitioner retorts that it

"does not seek protection from the hazards of lawful competition from Florida Prepaid, but rather protection against unfair competition in the form of false and deceptive statements . . . ." Brief for Petitioner at 32. CSB's response misses the point. Even unfair competition is merely a form of competition. It is part of the rough and tumble of the economic world that all competitors expect to encounter occasionally, just as every company expects to deal with a breached contract on occasion. The common law has developed remedies for certain types of unfair competition, just as it has for other torts and for breaches of contract, and federal and state statutes have been enacted to augment the common law protections. None of this remedial law, ancient or modern, changes the fact that the competitive tort of false advertising is different in kind from an actual state-sponsored taking of property. CSB's theory of property improperly grants Congress the power via the Fourteenth Amendment to federalize challenges to state conduct amounting to simple torts and breaches of contract.[3]

CBS argues that Florida Prepaid has adopted the "radical" view that Congress may not rely on its section 5 enforcement

3. Tellingly, CSB's expansive theory of business torts and the Fourteenth Amendment should have compelled a different result in *Seminole Tribe* itself. The CSB logic is inexorable: A casino is a business; therefore, the right to operate a casino is a property right with which the State may not "interfere" without violating the Fourteenth Amendment. If the State of Florida, in alleged violation of a federal statute, refuses to negotiate a gaming compact with an Indian tribe, thus "interfering" with the Tribe's right to operate a casino, the Tribe may sue the State in federal court. The result is that the Eleventh Amendment is swept away by the Fourteenth. This syllogism is every bit as plausible as CSB's argument here, but obviously was not applied in *Seminole Tribe*. The Court of Appeals for the Eleventh Circuit rejected a more narrowly conceived Fourteenth Amendment argument in *Seminole Tribe*. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1025 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996). The Tribe did not press the argument before this Court.

power to abrogate the Eleventh Amendment in order to protect rights created by Congress under Article I. *See, e.g.*, Brief for Petitioner at 22-23. Actually, this view follows from the holding of *Seminole Tribe*, as Florida Prepaid explains in detail in the Brief for Petitioner in No. 98-531.[4] In order to affirm the judgment of the Third Circuit here, however, this Court need hold only: (a) that Article I rights do not qualify for protection under the Fourteenth Amendment simply because they might be labeled "property"; or (b) that a claim that a property right protected under the Fourteenth Amendment has been taken without due process of law requires more than the bald assertion that a business is property; or (c) that enforcement action undertaken to protect legitimate property rights still must satisfy the "proportionality and congruence" test of *City of Boerne*. The Court of Appeals adopted essentially this view in rejecting CSB's contentions. *See* Pet. App. at 16a ("If a state's conduct impacting on a business always implicated the Fourteenth Amendment, Congress would have almost unrestricted power to subject States to suit through the exercise of its abrogation power.").

The United States intervened in this action in order to defend the constitutionality of the TRCA against Florida Prepaid's challenge. The only argument that the United States has made on behalf of CSB's position, however, is that Florida Prepaid should be deemed to have constructively waived its Eleventh Amendment immunity. *See infra* part II. On the Fourteenth Amendment issue, the United States acknowledges that "[t]he 'right' to be free from false representations concerning a competitor's products . . . bears none of the hallmarks of a property interest." Brief for U.S. at 31 (footnote omitted). Florida Prepaid agrees. What CSB simply fails to recognize is that

4. This proper reading of *Seminole Tribe* makes clear that neither the TRCA nor the Patent Remedy Clarification Act can be justified as an appropriate exercise of Congress's Fourteenth Amendment enforcement power.

merely because a tort can cause harm to property does not mean that the nonoccurrence of the tort — the "right" to be free of the interference — is itself property. *See Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) ("[T]he 'contractual right' at issue in this case bears little, if any, resemblance to rights held to constitute 'property' within the meaning of the Fifth Amendment.").

This case simply does not involve property that Congress may protect under the Fourteenth Amendment. Congress has no power, under the Fourteenth Amendment or any other provision of the Constitution, to strip the States of their Eleventh Amendment immunity and subject them to suits for false advertising. To hold otherwise would be to dismiss the Eleventh Amendment altogether. The question is not whether property rights may be bifurcated into those that are protected by the Fourteenth Amendment and those that are not. The real question is whether simply labeling an interest as "property" automatically confers upon Congress the power to enforce such interests against the States without regard for the Eleventh Amendment. The Court of Appeals has answered that question correctly: No.[5]

5. The Court of Appeals limited its decision to the case before it, which involves only allegations that a state actor has engaged in false advertising by misleadingly describing its own products. CSB criticizes that limitation by insisting that there is "no principled distinction" between misrepresentations concerning one's own product and misrepresentations concerning a competitor's product. Brief for Petitioner at 33. Although it is Florida Prepaid's view that neither type of misrepresentation can be deemed a deprivation of property in violation of due process, the Court of Appeals plainly acted appropriately in rendering a narrow decision.

B. Neither Florida Nor Any Other State Has Been Shown To Have Violated The Constitution By Denying Due Process Of Law To Persons Alleging The Deprivation Of Property Caused By The State's False Advertising.

The Fourteenth Amendment provision at issue here is a specific proscription of the deprivation of property by States *without due process of law.* The mere deprivation of property, without the denial of due of process of law, does not amount to a constitutional violation. *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 537 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1984). As the Court stated in *Parratt*:

> The Fourteenth Amendment protects only against deprivations "without due process of law." . . . Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law.

Id. at 537 (citation omitted); *see also Zinermon v. Burch*, 494 U.S. 113, 126 (1990); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

Nowhere in the Brief for Petitioner does CSB explain how the State of Florida has deprived it of property without due process of law. In its arguments, CSB typically defines the issues before the Court to focus solely on the question of the definition of property and to exclude any consideration of the remaining factors in a due process analysis. For example, CSB insists:

> The specific issue presented by this case is whether false and deceptive advertising implicates a business property right protected by the Fourteenth Amendment. The more fundamental constitutional issue presented by this case, as it relates to the power of Congress under Section 5 of the Fourteenth Amendment, is whether the Fourteenth Amendment applies to all liberty and property rights.

Brief for Petitioner at 25-26. CSB simply ignores the questions of actual deprivation of property and of the denial of due process of law.

As to due process, it is quite clear that CSB has not been and will not be denied due process of law by the State of Florida, even if one accepts CSB's theory that the tort of false advertising can constitute a deprivation of property within the meaning of the Fourteenth Amendment. Florida has enacted a general waiver of sovereign immunity for suits brought in state court in order to permit actions against the State to "recover damages in tort" for loss of property caused by the "negligent or wrongful act or omission" of state employees. Fla. Stat. § 768.28(1). The State is defined to include executive departments, "independent establishments of the state," and "corporations primarily acting as instrumentalities of the state." *Id.* § 768.28(2). Tort liability is initially limited to $200,000 per incident, but a plaintiff may petition the legislature to authorize payment in excess of the limit. *Id.* § 768.28(5).

Apart from this statutory waiver of immunity in tort suits, a person alleging deprivation of property may bring a reverse condemnation action against the State for just compensation. *See, e.g., Department of Agriculture & Consumer Services v. Polk*, 568 So.2d 35, 38-40 (Fla. 1990) (holding that grower was entitled to just compensation for the State's destruction of his citrus tree nursery stock). The liability limit of § 768.28 does not apply to such "takings" claims, *see Polk*, 568 So.2d at 38, because the Florida Constitution guarantees "full compensation" for deprivation of property by the State. Fla. Const. Art. X, § 6(a). Most States, like Florida, have enacted a limited waiver of sovereign immunity for tort suits, and/or have recognized direct actions for takings of property without just compensation.[6]

6. *See, e.g., Klopping v. City of Whittier*, 8 Cal. 3d 39, 43 (1972) (Cont'd)

Common law remedies, including damages, are available for unfair competition torts; indeed, CSB asserted a common law unfair competition claim against Florida Prepaid in this litigation. J.A. 23.[7] CSB certainly could have filed a lawsuit based on the common law prohibition of unfair competition in Florida state court, rather than New Jersey federal court. A business also may seek injunctive relief for unfair competition pursuant to the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201-213, which prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Id.* § 501.204; *see Big Tomato v. Tasty Concepts, Inc.*, 972 F. Supp. 662, 664 (S.D. Fla. 1997). Thus, state laws already provide suitable vehicles for seeking unfair competition remedies against States in state courts.

Lanham Act claims also may be brought directly in state courts. Federal jurisdiction in Lanham Act cases is concurrent, not exclusive. 28 U.S.C. § 1338(a); 15 U.S.C. § 1121. *See In re Keasby & Mattison Co.*, 160 U.S. 221, 230 (1895) (observing that the 1881 trademark act did not "take away or impair the jurisdiction which the courts of the several States always had over suits for infringement of trade-marks"); *Aquatherm Industries v. Florida Power & Light Co.*, 84 F.3d 1388, 1394 (11th Cir. 1996) ("Federal courts do not have exclusive

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(Cont'd)
(recognizing claim for inverse condemnation); N.Y. Ct. Cl. Act § 9(2) (authorizing New York Court of Claims to hear claims against the state for the appropriation of any real or personal property). *See generally* Appendix to Brief of *Amicus Curiae* States of Ohio *et al.* (compiling statutory remedies).

7. The District Court dismissed the common law unfair competition count at the same time it dismissed the Lanham Act claim. *See* Pet. App. B at 91a. CSB did not pursue the common law claim in state court.

jurisdiction over an action brought under the Lanham Act. . . . Therefore, Aquatherm could have litigated its Lanham Act claim while in state court, but chose not to do so.") (citations omitted). Thus, CSB could have brought its Lanham Act suit against Florida Prepaid in Florida state court, pursuant to Florida's general waiver of sovereign immunity. Bringing the action in federal court in New Jersey did not redress a denial of due process, but instead imposed an unnecessary and unconstitutional burden on Florida Prepaid.

The fact that common law unfair competition claims, Lanham Act claims, or "takings" claims may be brought in the courts of any State is dispositive. The availability of such remedies in state courts deprives the entire TRCA of a constitutional foundation. The type of interest or "property" involved under the Lanham Act is irrelevant if no denial of due process can be shown to have occurred. In particular, any Lanham Act plaintiff who believes that unfair competition by a State has deprived him of property can obtain constitutionally sufficient redress in the State's own courts.

Moreover, there is no legislative or judicial record to support the notion that Florida, or any other State, has been systematically injuring businesses through unfair competition without providing a remedy sufficient to satisfy the demands of due process. The Senate Report accompanying the TRCA fails to cite even a single example, let alone persuasive evidence, of such supposed wrongdoing. Congressional discretion in fashioning enforcement mechanisms under the Fourteenth Amendment is not broad enough to justify the creation of remedies based on supposition and speculation rather than realistic due process concerns. Section 5 is not a charter for federalizing tort law in order to achieve regulatory goals on the pretext that abrogation of the Eleventh Amendment advances legitimate due process interests.

Insofar as the TRCA provides a separate federal remedy, in the form of the abrogation of Eleventh Amendment immunity, for false advertising by States, it is addressing a nonexistent constitutional harm. Accordingly, the sweeping and intrusive remedy of subjecting the States to suit in any federal court in the nation is wholly unjustified under the "congruence and proportionality" test of *City of Boerne*. The TRCA is plainly unconstitutional.[8]

II. THE DOCTRINE OF "CONSTRUCTIVE WAIVER" OF ELEVENTH AMENDMENT IMMUNITY ANNOUNCED IN *PARDEN v. TERMINAL RAILWAY OF ALABAMA DOCKS DEPARTMENT* CANNOT BE APPLIED HERE.

After *Seminole Tribe*, Congress no longer has authority under Article I of the Constitution to abrogate Eleventh Amendment immunity. Petitioner, and the United States, therefore resort to the "constructive waiver" doctrine of *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), as a basis for abrogation. *Parden* held that a state which engages in commercial activities subject to congressional regulation relinquishes its Eleventh Amendment immunity and subjects itself to suit in federal court for claims relating to those activities. *See* 377 U.S. at 192. This doctrine cannot support jurisdiction over Florida Prepaid, however, because *Parden*, which is grounded on the Commerce Clause, cannot stand after *Seminole Tribe*. The Court should therefore overrule whatever may be left of *Parden*. Moreover, as the Court of Appeals correctly held, even assuming that *Parden* remains good law, the *Parden* doctrine does not apply here.

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8. Even if adequate state process were not already available across the country, the TRCA would remain invalid under *City of Boerne* because a federal remedy could be made less intrusive to the states than the TRCA, and more closely tailored to the nature of the alleged harm.

A. *Parden* Should Be Overruled Because The *Parden* Doctrine Is Fundamentally Inconsistent With *Seminole Tribe*, Which Established That Congress Has No Power Under The Commerce Clause To Curtail Eleventh Amendment Immunity.

(1) The District Court below held that *Parden* did not survive *Seminole Tribe*. *See* Pet. App. at 68a-73a. The Court of Appeals did not reach this issue, however, because of its holding that *Parden* was inapplicable on its own terms. Given the uncertainty that exists among the lower courts about *Parden*'s survival, this Court should take this opportunity to overrule *Parden* and make explicit what is implicit in *Seminole Tribe*: the Commerce Clause-based doctrine of "constructive waiver" established in *Parden* is simply abrogation by another name, and is beyond the power of Congress under Article I.

If the teaching of *Seminole Tribe* is followed, a State's mere participation in an area subject to federal legislation that includes a congressional attempt to curtail sovereign immunity cannot create a "waiver" of immunity. It would be directly contrary to *Seminole Tribe* to permit a congressional attempt to abrogate the Eleventh Amendment actually to achieve the same result by positing a "waiver" that arises out of nothing more than a State's carrying out its activities in the regulated area. Congress cannot achieve indirectly, through "waiver," what it cannot do directly, through express abrogation.

Parden effectively permits Congress to require States to cede their immunity. Accordingly, a *Parden* waiver can be implemented only where Congress retains authority to curtail the Eleventh Amendment. No such authority remains, however, except for the nonsubstantive, remedial enforcement power of the Fourteenth Amendment. The decision in *Parden* that States can implicitly waive their Eleventh Amendment immunity through participation in a regulated field was inextricably linked

to — indeed, was based on — the view held by some members of the Court in 1964 that Congress enjoys authority under the Commerce Clause to curtail Eleventh Amendment immunity. Squarely addressing the question of congressional authority, the *Parden* Court stated:

> Respondents contend that Congress is without power, in view of the immunity doctrine, thus to subject a State to suit. We disagree. Congress enacted the FELA *in the exercise of its constitutional power to regulate interstate commerce*. . . . While a State's immunity from suit by a citizen without its consent has been said to be rooted in "the inherent nature of sovereignty," . . . *the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce*. . . . By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.

377 U.S. at 191-92 (emphasis added; citations and footnotes omitted). The suggestion that Alabama, the State in question, "necessarily consented" to suit by operating the railroad, *id.* at 192, was the conclusion, rather than the premise, of the Court's reasoning regarding the Commerce Clause and the Eleventh Amendment.

The holding of *Parden* thus depends on a now discredited view of congressional authority under the Commerce Clause to

restrict Eleventh Amendment immunity.[9] This Court correctly summarized the essential holding of *Parden* in *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), where the Court applied to the *Parden* doctrine the requirement of *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), that "an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Welch*, 483 U.S. at 478. The Court also noted that

> we have no occasion in this case to consider the validity of the additional holding in *Parden*, that Congress has the power to *abrogate* the States' Eleventh Amendment immunity *under the Commerce Clause* to the extent that the States are engaged in interstate commerce.

Id. at 478 n.8 (emphasis added). Clearly, the Court in *Welch* saw little reason to distinguish between the nomenclature of "waiver" and that of "abrogation"; the practical effect of the elimination of Eleventh Amendment immunity by congressional action was correctly deemed the only relevant consideration.

Moreover, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the case that finally stated unambiguously that the Commerce Clause authorizes Congress to abrogate state immunity (and which now has been overruled by *Seminole Tribe*), Justices on both sides of the issue acknowledged that *Parden*'s continued vitality depends on whether or not direct abrogation authority exists under the Commerce Clause. The plurality opinion observed:

> Though we have never squarely resolved this issue of congressional power, our decisions mark a trail unmistakably leading to the conclusion that

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9. *See, e.g.*, Vazquez, 106 Yale L.J. at 1698 & n.67 (describing Justice Brennan's view in *Parden* as "a broad theory of congressional power to abrogate sovereign immunity under Article I").

Congress may permit suits against the States for money damages. The trail begins with *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964). There, in responding to a state-owned railway's argument that Congress had no authority to subject the railway to suit, we concluded that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," *id.*, at 191, and that "[b]y empowering Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation," *id.*, at 192. Although it is true that we have referred to *Parden* as a case involving a waiver of immunity, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451 (1976), the statements quoted above lay a firm foundation for the argument that Congress' authority to regulate commerce includes the authority directly to abrogate States' immunity from suit.

491 U.S. at 14. Thus, if "the argument that Congress' authority to regulate commerce includes the authority directly to abrogate States' immunity from suit" is rejected, as it was in *Seminole Tribe*, *Parden* must be rejected as well.

Dissenting in *Union Gas*, Justice Scalia[10] argued that even viewing *Parden* as a waiver case could not save it from constitutional infirmity under the analysis that eventually triumphed in *Seminole Tribe*:

> *Parden* is the only case in which we have held that the Federal Government can demand, as a

10. This portion of Justice Scalia's opinion in *Union Gas* was joined by the Chief Justice, Justice O'Connor, and Justice Kennedy.

> condition to its permission of state action regulable under the Commerce Clause, the waiver of state sovereign immunity. . . . [I]n *Welch*, we overruled *Parden* insofar as that case spoke to the clarity of language necessary to constitute such a demand. . . . We explicitly declined to address, however, the continuing validity of *Parden*'s holding that the Commerce Clause provided the constitutional power to make such a demand. . . . I would drop the other shoe.
>
> There are obvious and fatal difficulties in acknowledging such a power if no Commerce Clause power to abrogate state sovereign immunity exists. All congressional creations of private rights of action attach recovery to the defendant's commission of some act, or possession of some status, in a field where Congress has authority to regulate conduct. Thus, *all* federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and — to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability — can be redescribed as invitation to "waiver." . . . [T]o acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers. . . . There is little more than a verbal distinction between saying that Congress can make the Commonwealth of Pennsylvania liable to private parties for hazardous-waste cleanup costs on sites that the Commonwealth owns and operates, and

> saying the same thing but adding at the end "if the Commonwealth chooses to own and operate them." If state sovereign immunity has any reality, it must mean more than this.

Union Gas, 491 U.S. at 42-44 (Scalia, J., concurring in part and dissenting in part) (citations and footnotes omitted).

Justice Scalia's opinion in *Union Gas* sets forth the reasoning which the Court should adopt in deciding the question of *Parden*'s viability after *Seminole Tribe*.[11] Because Congress has no power to abrogate Eleventh Amendment immunity under the Commerce Clause, *Parden*-style waivers also should be impossible. Congress's power to extract a "waiver" from States must rest on some constitutional foundation, for Congress cannot act absent such authority. The only possible source of that power — indeed, the source explicitly identified in *Parden* — is the Commerce Clause. Once it has been determined that the Commerce Clause does not authorize Congress to curtail Eleventh Amendment immunity, then the only constitutional underpinning of the *Parden* doctrine has been destroyed. It is simply a necessary corollary of the holding in *Seminole Tribe* that *Parden*-based constructive waivers have been eliminated.

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11. The United States attempts to reconcile *Parden* with *Seminole Tribe* by citing this Court's comment in *Seminole Tribe* to the effect that *Parden* stands for "the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity." Brief for U.S. at 25 (quoting *Seminole Tribe*, 517 U.S. at 65). The Court's holding in *Seminole Tribe*, however, does not expressly address the question of *Parden*'s survival. Moreover, shortly after deciding *Seminole Tribe*, the Court vacated a lower court's application of *Parden* and remanded for reconsideration in light of *Seminole Tribe*. *See Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995), *vacated & remanded*, 517 U.S. 1184 (1996).

Accordingly, the Court should formally overrule the remnants of *Parden*.[12]

Some courts of appeals already have reached the conclusion that after *Seminole Tribe*, *Parden* cannot survive. The Court of Appeals for the Fifth Circuit, responding to a remand from this Court directing it to reconsider its application of *Parden* in light of *Seminole Tribe*, has announced that holding explicitly. *Chavez v. Arte Publico Press*, 139 F.3d 504, 508 (5th Cir. 1998) (holding that "[a] fair reading of *Seminole*" compels the conclusion that forced waivers of immunity are impermissible), *modified*, 157 F.3d 282 (5th Cir. 1998), *reh'g granted*. Other courts have recognized the demise of *Parden* as inevitable. The Fourth Circuit has acknowledged:

> We realize that the power to define waiver can become the functional equivalent of the power to abrogate. Indeed, defining waiver as anything less than "the sort of voluntary choice which we generally associate with the concept of constitutional waiver" permits Congress to do indirectly what it perhaps could not do otherwise.

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12. In *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), which involved the application of the FELA to state entities in state courts, this Court held that the doctrine of *stare decisis* prevented the overruling of *Parden*'s statutory-construction holding that Congress intended the FELA to apply to the states. The Court observed, however, that in so doing it preserved only an "ordinary rule of statutory construction," *id.* at 205 (citation omitted), and noted that in the past it had not hesitated to overrule a portion of *Parden*'s constitutional holding after announcing the rule that Congress must provide a clear statement of its intent to abrogate Eleventh Amendment immunity: "That rule was developed after the *Parden* decision, and was found in *Welch* to have undercut the reasoning of *Parden* and to require *Parden*'s Eleventh Amendment holding to be overruled." *Id.* at 204. Similarly, the rule developed in *Seminole Tribe* "undercuts" the remainder of *Parden* and requires it to be overruled.

Aer-Aerotron, Inc. v. Texas Department of Transportation, 104 F.3d 677, 681 (4th Cir. 1997) (quoting *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 296 (1973) (Marshall, J., concurring)). One of the members of the *Aer-Aerotron* panel faced the issue even more directly in a concurrence:

> [I]f *Seminole Tribe* made anything clear, it is that Eleventh Amendment immunity is a function of a State's sovereign constitutional status, not Congress' Article I powers. . . . *Seminole Tribe* held that Congress' Article I powers are irrelevant to an Eleventh Amendment waiver. Instead, a state's actions waive immunity when such actions are independently sufficient under Eleventh Amendment doctrine.

104 F.3d at 683 (Niemeyer, J., concurring). The Second Circuit has been equally blunt:

> *Parden*'s viability, in light of *Seminole Tribe*, is precarious. If Congress no longer has the power to abrogate state sovereign immunity under Article I, constructive consent should not become a shunt to Article III bypassing the mandate of the Supreme Court.

Close v. State of New York, 125 F.3d 31, 40-41 (2d Cir. 1997); *see also American Federation of State, County & Municipal Employees v. Virginia*, 949 F. Supp. 438, 442 (W.D. Va. 1996) (holding that *Seminole Tribe* "essentially rejected" the reasoning of *Parden*), *aff'd on other grounds*, 145 F.3d 182 (4th Cir. 1998).

(2) Both the United States and *amicus curiae* International Trademark Association attempt to salvage *Parden* by arguing that the congressional extraction of a "waiver" of Eleventh Amendment immunity through legislation regulating commerce in which States participate is akin to the congressional attaching

of conditions on the States' receipt of federal funds. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court held that Congress could use its spending power under Art. I, § 8, cl. 1 of the Constitution to promote a uniform national drinking age by conditioning the receipt of federal highway funds on a State's adoption of a minimum drinking age of twenty-one. As the Court explained:

> The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." . . . [O]bjectives not thought to be within Article I's "enumerated legislative fields[]" . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

Id. at 206-07 (citations omitted).

The obvious problem with applying the spending power waiver doctrine to the TRCA is that the TRCA does not involve any disbursement of federal funds directly to the States. Nor, for that matter, does the Lanham Act itself, which the TRCA amends. Congress never offered Florida Prepaid federal funds for use in its prepaid tuition program or for any other purpose in exchange for a waiver of Eleventh Amendment immunity. Thus, *South Dakota v. Dole* does not apply here.

Moreover, it is doubtful that the spending power waiver doctrine could apply even if funds had been disbursed by Congress and accepted by Florida Prepaid. The United States argues that the types of concessions Congress may extract from States through funding programs include waivers of Eleventh Amendment immunity. *See* Brief for U.S. at 14-15 (citing *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998)). This Court, however, has never approved such a waiver scheme. A significant difference exists between influencing state policy decisions and coercing States to abandon a specific right guaranteed by the Constitution. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (noting that "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights").

The United States appears to recognize that *South Dakota v. Dole* is inapplicable on its own terms. However, by combining *Dole* with several other decisions involving various types of waiver,[13] the United States attempts to cobble together a more generalized theory of "constitutional conditions" by which Congress, in exchange for the provision of certain benefits to the States, can retain the power to extract constructive waivers of Eleventh Amendment immunity. There are several significant difficulties with this argument. First, the United States ignores the fact that older decisions such as *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), cannot be used to defend *Parden* after *Seminole Tribe* because the older decisions themselves, to the extent they might be deemed to apply in the

13. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) (interstate compacts); *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 1999 Westlaw 65021 (7th Cir. Feb. 10, 1999) (Telecommunications Act of 1996); *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1163 (1998) (Randolph-Sheppard Act); *In re Straight*, 143 F.3d 1387 (10th Cir.), *cert. denied*, 119 S. Ct. 446 (1998) (bankruptcy).

Eleventh Amendment context, would require careful re-examination in light of *Seminole Tribe*. Second, even post-*Seminole* decisions such as *In re Straight*, 143 F.3d 1387 (10th Cir.), *cert. denied*, 119 S. Ct. 446 (1998), cannot be firmly relied upon because their holdings are controversial. As the United States acknowledges, *In re Straight* conflicts with the Fourth Circuit's decision in *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998), which found unconstitutional under *Seminole Tribe* the same forced waiver scheme in the bankruptcy code approved by the Tenth Circuit in *Straight*.

The fatal flaw in the argument of the United States, however, is that any potentially legitimate use of "constitutional conditions" by Congress to extract waivers of rights from States must involve a *quid pro quo* voluntarily accepted by the States. As in the spending power cases, Congress must provide some concrete benefit directly to the States, which the States are free to consider and to accept in exchange for relinquishing their rights. No *quid pro quo* exists here. Congress has not provided funds to the States through the TRCA, nor has it provided any benefit that could even arguably support an ostensibly bargained-for waiver of Eleventh Amendment immunity. The TRCA, in relevant part, indicates only that the States may be sued in federal court for violations of the Lanham Act. The statute gives nothing to the States as "consideration" for the waiver that it purportedly extracts.

Nor can the *quid pro quo* justification be made broad enough to support the *Parden* doctrine in general. The notion that a State receives the "benefit" of being protected by the federal statutory scheme in exchange for submitting itself to federal jurisdiction, *see* Brief for United States at 28-29, plainly demonstrates that the argument of the United States is a mere restatement of the original *Parden* doctrine, not a true apologia for *Parden* that takes into account *Seminole Tribe*. *Every* federal statute arguably

confers the benefit of the protection of federal law on all those it regulates. If such a diffuse benefit were deemed sufficient to constitute a *quid pro quo* that might be traded for the waiver of Eleventh Amendment immunity, then every federal statute that regulates commerce would be capable of extracting a "waiver" of immunity from every State that participates in commerce.[14] *Seminole Tribe* notwithstanding, Congress would enjoy the functional equivalent of abrogation power: the authority under Article I to coerce "waivers" of Eleventh Amendment immunity in every legislative context.[15]

Parden relied on a legal fiction: a broad view of congressional abrogation power under the Commerce Clause was cloaked in the language of waiver. This Court should reject the offer of a second, supplemental fiction — the elective exchange of rights for benefits — to replace the expired original. The Court should reject the markedly overbroad reading of its spending power precedents put forward by the United States,

14. Moreover, as discussed below in part II.C, Florida Prepaid began its prepaid tuition program *before* the TRCA was enacted. If the argument of the United States were accepted, Congress would be able to demand of states already engaged in targeted activities that they either cease operations or relinquish their Eleventh Amendment immunity in exchange for the "privilege" of being able to continue the existing program.

15. The International Trademark Association suggests that subjecting state actors to federal court jurisdiction would "level the playing field" by imposing on the states the same burdens that private parties must bear. *See* Brief Amicus Curiae of the International Trademark Association at 10-13. The United States echoes this concern. *See* Brief for U.S. at 29-30 (advocating "evenhandedness"). Such arguments ignore the fact that the Eleventh Amendment was proposed and ratified precisely to *avoid* a "level playing field." Policy preferences of this type do not support the application of the *Parden* doctrine, whether the doctrine is justified as a raw exercise of Commerce Clause power or as the genteel exchange of rights for benefits.

and should hold that constructive waivers under *Parden* cannot be justified after *Seminole Tribe* as the supposed products of a voluntary exchange.

In sum, the *Parden* waiver doctrine is based on a premise — the existence of congressional authority under the Commerce Clause to shape the contours of state sovereign immunity — that this Court re-examined and rejected in *Seminole Tribe*. *Parden* is now obsolete, and should be expressly overruled.

B. Even If *Parden* Remains Good Law, The *Parden* Doctrine Of Constructive Waiver Of Immunity Does Not Apply Here Because Florida Prepaid Is An Agency Of The State Of Florida Carrying Out The Core Governmental Function Of Promoting Education.

Even if the *Parden* waiver doctrine had any lingering vitality after *Seminole Tribe*, it could apply only to situations where a State is involved in an area of commerce not normally occupied by government. *See Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 284-85 (1973). CSB argues here that Florida Prepaid is engaged in a proprietary enterprise not traditionally occupied by state government, and is therefore vulnerable to *Parden*. *See* Brief for Petitioner at 38-41. This contention is in error, as the Court of Appeals held. Florida Prepaid enables the State of Florida to provide higher education to its citizens — undeniably a central function of state government. Accordingly, the *Parden* doctrine, on its own terms, cannot apply to the activities of Florida Prepaid.

Florida Prepaid's primary goal is advancing education for Florida citizens within the State of Florida. This Court long has recognized the fact that "education is perhaps the most important function of state government." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The Court recently reaffirmed that education is an area "where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995).

In *Lopez*, a case not involving the Eleventh Amendment, this Court struck down legislation founded on a sweeping interpretation of congressional power under the Commerce Clause. *See also Skehan v. State System of Higher Education*, 815 F.2d 244, 247-49 (3d Cir. 1987) (holding that the Pennsylvania State System of Higher Education, "a body corporate and politic" created by state law to administer educational institutions, was entitled to claim Eleventh Amendment immunity, and stating that "[p]roviding education has long been recognized as a function of state government").

CSB largely disregards the promotion of educational objectives in its discussion of the activities of Florida Prepaid. Certainly, providing a state agency which exists for the purpose of helping people pay for the education of Florida citizens at Florida universities and community colleges is vital to Florida's attainment of its educational objectives in operating these institutions; an empty school that citizens cannot afford to attend does nothing to achieve the goal of education. Florida Prepaid provides a substantial benefit that directly and significantly promotes the educational objectives of the State of Florida, as the Court of Appeals found:

> The Florida legislature specifically authorized and created Florida Prepaid to facilitate the education of its citizens. The core government function of education does not necessarily only embody the actual teaching of individuals; it is a broader function which can incorporate actions that involve related aspects to this overall goal. Florida Prepaid serves the important government interest of education by making it affordable to its citizens.

Pet. App. at 24a.

CSB's argument that *Parden* was applied incorrectly is based largely on the fact that prepaid tuition programs are not operated *exclusively* by state governments. *See* Brief for Petitioner at 40-41. This argument badly misses the mark. Florida Prepaid pursues the larger goal of making higher education available and affordable to its citizens, and that is a traditional state activity — a core function of the States. State governments commonly operate college and university systems that, in appropriate cases, can assert Eleventh Amendment immunity. *See, e.g., Regents of the University of California v. Doe*, 519 U.S. 425, 427 & n.2 (1997) (noting the Ninth Circuit's recognition of such immunity for the University of California). Obviously, however, States are not the exclusive administrators of such institutions. Under CSB's view, a state university always would be subject to the *Parden* doctrine, and thus never could claim the protection of the Eleventh Amendment. Indeed, CSB's crudely literal reading of the formula in *Parden* that a State may waive its immunity if it "leaves the sphere that is exclusively its own," Brief for Petitioner at 41 (quoting 377 U.S. at 196), would strip States of their immunity for doing anything other than operating a legislature, an executive and a judiciary.

The Court of Appeals correctly held that *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 284-85 (1973), modified *Parden* by expanding the scope of important state activities that would not implicate constructive waivers of sovereign immunity. *See* Pet. App. at 19a. There is no constitutional difference between a State's operation of a system of hospitals, as in *Employees v. Missouri Department of Public Health*, and a State's operation of a prepaid tuition program. Both are large-scale, financially complex activities that usually compete with similar offerings from private companies.

Petitioner also complains that

> [t]he Court of Appeals has confused the distinction between the role of the States in providing

> educational institutions with the quite different function of providing investment vehicles for assisting parents and others to meet the costs of college.

Brief for Petitioner at 41. Petitioner has created a straw man, however, by insisting that Florida Prepaid offers "investment vehicles" to the public. The United States makes the same mistake by repeatedly arguing that Florida Prepaid sells "commercial investment products." Brief for United States at 24; *see also id.* at 30. In fact, Florida Prepaid offers "advance payment contracts," not conventional investment vehicles. *See* Fla. Stat. § 240.551(2)(e)(1), J.A. 46. The Florida Prepaid program does not produce investment income. According to section 5.01 of the Florida Prepaid Master Covenant,

> [t]his Master Covenant is not a debt instrument. Except for the circumstances in Paragraphs 5.02, 555.03, and 5.08, termination or default will entitle you [the purchaser] to a refund of the amount paid into the plan, minus reasonable administrative fees established by the Board. No interest will be refunded.

The Master Covenant further provides:

> All legal and beneficial interests in the assets held by the trust fund are vested in the State for its exclusive benefit and the exclusive benefit of the colleges and universities; therefore, payments are guaranteed to be made on the beneficiary's behalf to the State college or university. Exercise of full benefits under the contract guarantees the beneficiary receipt of services and the beneficiary will not receive any funds.

Florida Prepaid Master Covenant, § 5.08. Thus, Florida Prepaid's contracts are not investment vehicles; they are agreements to purchase college services by advance payment.

The Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996), extended tax-exempt status to all state-run prepaid tuition programs. Congress apparently has recognized that promoting education through the establishment and operation of college tuition prepayment programs is an appropriate function of state government. Congress also has recognized the distinction between state-run tuition prepayment programs and private, for-profit tuition savings programs, such as CSB's, by giving favorable tax treatment to state-run programs.[16] *See id.*

The real question raised by the arguments of Petitioner and the United States is whether the *Parden* doctrine can be applied to freeze States into a limited, archaic role in providing for the educational needs of their citizens. Education today, particularly higher education, has become complex, bureaucratic, and expensive. Any State that operates a university system is already

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16. Tax-exempt status applies to "qualified State tuition programs," which are defined as programs

> established and maintained by a State or agency or instrumentality thereof under which a person (i) may purchase tuition credits or certificates on behalf of a designated beneficiary which entitle the beneficiary to the waiver or payment of qualified higher education expenses of the beneficiary, or (ii) may make contributions to an account which is established for the purpose of meeting the qualified higher education expenses of the designated beneficiary of the account. . . .

Id. § 1806 (codified as amended at 26 U.S.C.A. § 529(b)(1) (Supp. 1998)).

operating a multi-billion dollar "business" that competes with similar private institutions. The financial aid departments of such state university systems perform sophisticated economic tasks, including the making of loans to students and their parents, that cannot be deemed constitutionally distinct from the economic activities of Florida Prepaid. Neither type of organization is an investment house or profit-making venture;[17] each, in its own way, is contributing to the educational attainment of the citizenry. If the *Parden* doctrine is deemed applicable to Florida Prepaid, it must also be applied to myriad other state activities that go beyond the running of a legislature, executive, and judiciary, but have become essential for the welfare of the people of the State. This Court should decline the invitation to confine the States to a primitive, excessively narrow conception of their governmental functions.

Because Florida Prepaid is performing a role traditionally undertaken by state governments — making available affordable educational benefits — the Court of Appeals properly held that the *Parden* doctrine cannot apply to eliminate Florida Prepaid's immunity under the Eleventh Amendment.

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17. The United States suggests that Florida Prepaid has been "highly profitable, amassing a surplus of more than $184 million during the first seven years of its operations." Brief for U.S. at 27. A not-for-profit entity does not become a for-profit business simply because it accumulates a surplus — funds that are held in reserve for future expenses and are not used to enrich owners (which Florida Prepaid lacks). Florida Prepaid is not a for-profit agency, and it has not earned a profit merely because it holds a reserve to pay future education expenses. Many States currently enjoy budgetary surpluses as a result of the continuing economic boom, but obviously cannot be deemed for-profit enterprises.

C. The TRCA Is Insufficient To Trigger A Waiver Of Immunity Under *Parden* Because The Statute Does Not Provide Clear Notice To States That Engaging In A Specifically Defined Type Of Commerce Will Result In The Loss Of Eleventh Amendment Protection.

Even assuming that, theoretically, a State's operation of a prepaid tuition program could be considered the type of commercial activity that falls within the narrow scope of *Parden*'s constructive waiver doctrine, the TRCA is plainly insufficient to trigger such a waiver. The statute simply cannot be read as an adequate warning from Congress that the States are deemed to forfeit their Eleventh Amendment immunity *if they decide to operate prepaid tuition programs*. The TRCA does not regulate state prepaid tuition programs or any related financial programs or products. Like the Lanham Act itself, the TRCA simply applies to commerce *in general*, conceived in the broadest possible terms. Because the TRCA does not set forth a congressional plan with respect to a particular type of commercial activity, it cannot reasonably be interpreted to alert States to the possibility of the loss of sovereign immunity resulting from participation in a defined type of commerce.

Thus, the Court of Appeals was mistaken in stating that *Parden* could have been triggered here because

> the [TRCA] declares that if a state or its instrumentality chooses to engage in a proprietary activity that potentially falls under the Lanham Act, it can be held liable in federal court for violations of that Act.

Pet. App. at 21a. There are few types of proprietary activity that do not "potentially fall" within the scope of the Lanham Act, which forbids false advertising, trademark infringement, and other offenses in interstate commerce generally.

Parden itself sets forth the requirement of an explicit connection between the regulation of a specific type of commerce and a State's decision to "waive" its immunity by participating in that type of commerce:

> By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, *Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act*; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

377 U.S. at 192 (emphasis added). In contrast, through the TRCA Congress has not conditioned the operation of a prepaid tuition program in interstate commerce on anything, let alone the forfeiture of Eleventh Amendment immunity. Congress has simply declared that States which violate the Lanham Act may be sued in federal court.

The Brief for the United States correctly describes the *Parden* test but fails to acknowledge that the TRCA fails that test. According to the United States,

> Florida Prepaid chose to sell and to advertise commercial investment products in competition with private enterprises. The question whether *that conduct* effected a knowing and voluntary waiver of Eleventh Amendment immunity turns on two subsidiary inquiries. First, a State's conduct can be treated as a knowing wavier of Eleventh Amendment immunity only if Congress has *unambiguously provided that a State that engages*

> *in such conduct* will be subject to suit in federal court.

Brief for U.S. at 24 (emphasis added); *see also id.* at 28 n.8 (again stating test in terms of a State's decision to engage in "specified conduct"). The Solicitor General's formulation of the first *Parden* factor thus recognizes that the "conduct" that supposedly constitutes a waiver of immunity is the marketing of a prepaid tuition program (which the United States misdescribes as selling "commercial investment products"). Clearly, however, Congress has *not* unambiguously provided that the operation of a prepaid tuition program will subject a State to suit in federal court; the TRCA nowhere mentions prepaid tuition programs. The only "conduct" described in the statute as the basis for the loss of immunity is the conduct of violating the Lanham Act.

A statute that applies to *all* interstate commerce, and merely warns States of the loss of sovereign immunity if they violate the statute in any way, cannot be sufficient to trigger *Parden*. The contrary result would tear the *Parden* doctrine loose from its already fragile moorings in the law of waiver and make it a free-floating abrogation engine just as powerful as, and little different from, the Commerce Clause abrogation doctrine this Court rejected in *Seminole Tribe*.

Finally, attention to *Parden*'s requirement of congressional regulation of *specific* state conduct is especially important here because the Florida Prepaid program at issue predates the congressional attempt to make the States amenable to suit under the Lanham Act. The Florida Prepaid program was enacted in 1987 and began operations in 1988. J.A. 27. The TRCA did not become effective until October 27, 1992. Thus, Florida Prepaid was engaged in the conduct of operating a prepaid tuition program years before Congress purported to condition participation in such activity — even assuming the TRCA could

be read in this distorted fashion — on a "waiver" of sovereign immunity. Nothing in *Parden* suggests that Congress can extract a *retroactive* waiver from States engaged in activities newly subject to legislation. *See* 377 U.S. at 192 ("Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act."); *see also Close v. State of New York*, 125 F.2d 31, 40 (2d Cir. 1997) ("[G]iven that New York had employees before the enactment of the FLSA and before it was made applicable to the States, its continued status as an employer cannot realistically be construed as a waiver of immunity.").

Thus, even assuming: (1) that the *Parden* doctrine survives *Seminole Tribe*; and (2) that Florida Prepaid's operation of a prepaid tuition program constitutes commercial activity that is subject to *Parden*, the constructive waiver doctrine still cannot be applied here because the TRCA is incapable of triggering such a waiver.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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